

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 584 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
 4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge? : NO

PARMAR VIRCHANDBHAI KESHAVALAL

Versus

KALYAN CO.OPERATIVE BANK LIMITED

Appearance:

MR KIRIT I PATEL for Petitioner

MR SV PARMAR for Respondent No. 1

MS NANDINI JOSHI for Respondent No. 2, 3

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 26/09/2000

ORAL JUDGEMENT

This Revision Application has been filed
against the judgment and order dtd 29th March, 1997
passed by the 3rd Joint Civil Judge (J.D.), Mahesana
whereby application exh. 26 of the petitioner has been

rejected.

2. The learned counsel for the petitioner pointed out that the respondent no.2 Kamlaben Mohanlal Parmar took certain loan from the respondent no.1 bank. The respondent nos. 3 stood as guarantor and gave an undertaking that in case the respondent no. 2 Kamlaben Mohanbhai Parmar is unable to pay the amount of loan, he will pay the amount. The bank got the certificate for the amount to be recovered in the proceedings from the property of the petitioner. The learned advocate for the petitioner submitted that the petitioner has purchased the house from the respondent no.3, husband of Kamlaben after giving full consideration and paying of liabilities of Sarvoday Commercial Bank and the house of defendant no.1 is not in city survey record, but it has been fraudulently inserted in the property register card and he requested that his property should not be attached.

The trial court, after considering the fact that the loan was granted to the defendant no.1 Kamlaben prior to the said transfer of the property and the provisions of sections 52 and 53-A of the Transfer of Property Act, prohibit such transfer and the third party has to file a separate suit under Order 21, Rule 58 of Civil Procedure Code, held that the application of the petitioner, being a third party was liable to be dismissed. The trial court also considered that the transfer has been made after loan was sanctioned to the defendant no.2. The property was running in the name of husband of Kamlaben Parmar in the city survey record. The bank also produced one application (Kabuliatnama) of Mohanbhai Parmar, husband of Kamlaben Parmar given to the bank at the time of sanctioning of loan at mark 43/1 in which Mohanbhai has stated that the property has been transferred in the name of his wife and she is the defendant no.1. The trial court has also considered that such transfer is prohibited by Transfer of Property Act. If such transfer is allowed, nobody will be able to recover money advanced and the husband's property is also liable to be attached. The third party has purchased the said property after giving full consideration. Hence, the application was rejected by the trial court.

3. The learned counsel for the petitioner submitted that the property has not been attached. In case, the property is attached, the petitioner who has purchased the property will be entitled to move the court concerned under Order 21 Rule 97 of Civil Procedure Code and if the property is attached, the petitioner has to

raise objections under Order 21, Rule 58 of Civil Procedure Code and in case any person goes to attach the property, then the petitioner would be entitled to move or raise obstruction under Order 21, Rule 97 of Civil Procedure Code. In case, such objection or obstruction is raised in respect of the immovable property by any person claiming right, title or possession, that will be required to be decided by the Court in accordance with Rule 101 of Order 21 of Civil Procedure Code. It appears that the bank has gone to attach the property of the petitioner who had purchased the property bonafide after giving full consideration and getting it released from the liability or charge of Sarvoday Commercial Bank. The petitioner is entitled to make obstruction to the possession of the property under Order 21, Rule 97 of C.P.C. The trial Court has erroneously rejected the application and the trial court is required to make the inquiry in compliance with the procedure provided under Order 21, Rule 98 of C.P.C. and that is to be decided after giving full opportunity to the parties concerned as per the procedure laid down in Order 21, Rule 101 of C.P.C. The learned counsel for the petitioner relied on the decision of this Court in the case of Chandravati Co.Op. Housing Society Ltd., Maninagar vs. Bhairavnath Education and Cultural Society, reported in 34(1) Gujarat Law Reporter, 116 in which it has been held as under:

" When holder of a decree for possession was obstructed by a third party, Rule 97 provides him a remedy to apply to the Court complaining of such resistance or obstruction and sub-rule (2) of Rule 97 which is substituted for old sub-rule (2) provides that the Court shall proceed to adjudicate upon the application in accordance with the provisions contained therein. The sub-rule (2) of Rule 97 is major departure from the scheme of removal of obstruction enacted under old Rule 97. It is pertinent to note that once such application is given by the holder of decree for possession, the executing Court is obliged to proceed to adjudicate upon the application. The use of the words "shall" proceed to "adjudicate" leave no room for doubt that the exercise which the Court is to undertake is that of adjudicating the claims of the parties. The legislature has by introduction of the aforesaid sub-rule (2) of Rule 97 substituted the summary remedy provided to a decree-holder by a full-fledged adjudication proceeding and the order made therein has the force of the decree and is subject to an appeal. It, therefore,

becomes clear that remedy which is provided to a holder of decree for possession of immovable property under Rule 97 of Order 21 is now a substantive remedy wherein even adjudication of right, title and interest of the obstructor can be gone into by the executing Court in view of the language employed in Rule 101 of Order 21 of Civil Procedure Code."

4. The trial court has not decided the objection or obstructions raised by the petitioner under Order 21, Rule 97, C.P.C. and the objection should have been investigated by the trial court as per procedure provided under Order 21, Rule 98 and Rule 101 of C.P.C. and objection or obstruction ought to have been decided as per procedure provided by C.P.C.

5. The contention of the learned counsel for the respondent bank is that the property has already been attached under Order 21, Rule 54 of Civil Procedure Code. Then notice under Order 21, Rule 54 (1A) and under Order 21, Rule 58 of C.P.C. was issued inviting objections regarding proclamation of the sale of the property. Unless the property is attached, any person has no right to raise any claim or objection. The application of the petitioner was entertained and rightly rejected by the court concerned. In case the application is rejected, then it would amount to a decree as defined under Section 2(2) of C.P.C. and under Order 21, Rule 54(4) of C.P.C. an appeal would lie against that order. Hence, this Revision Application is not entertainable. The contention of the learned counsel for the respondent bank has no substance inasmuch as in view of the provisions of Order 21, Rule 103 of C.P.C., the order passed under the provisions of Order 21, Rule 98 or 100 of C.P.C. will be deemed to be a decree. All questions regarding right, title or interest in the property between the parties are required to be adjudicated not by a separate suit as per Order 21, Rule 101 of Civil Procedure Code. In such an application raising objection or obstruction is not entertained, then in view of the provisions of Order 21, Rule 58(5) C.P.C., separate suit is required to be filed for adjudication of right, title or interest, otherwise, separate suit is not entertainable.

6. If a property is required to be attached in execution of a decree, the Court as per provisions of Rule 54(1A) of Order 21, C.P.C., has to issue notice for settling terms of proclamation of sale or where the property has been attached in execution of a decree, if any person has any claim or objection subject to

conditions provided by proviso to Rule 58(1) of Order 21, C.P.C. The Court is under an obligation to adjudicate the claim or objection under the provisions of Order 21, Rule 58(2) C.P.C. The claimant or objector is barred to file a separate suit for adjudication for his claim or objection. In the present case, the application of the petitioner has been summarily rejected without adjudicating rights, title or interest under the procedure provided therefor. In case, this application would not have been entertained, the petitioner could have got his right or objection adjudicated by filing a separate suit as per provisions of Order 21, Rule 58(5) C.P.C. But in the present case, the petitioner is barred to file a separate suit for adjudication of his right, claim or objection as his application was not entertained, but rejected summarily without adjudicating his right, claim or objection. As such, the Court below has committed an error in not exercising the jurisdiction vested in it.

7. In the facts and circumstances, it appears that the trial court has committed an error on the face of record. In case objection or obstruction of the petitioner is rejected summarily as per provisions of Order 21, Rule 58(5) and Order 21, Rule 101, C.P.C., the petitioner would not be able to file a separate suit challenging the action of the respondent no.1 bank. The objection has not been investigated as per procedure provided under C.P.C. and that is required to be decided as per procedure laid down by Order 21, rule 101 of C.P.C.

8. In view of the above, this Civil Revision Application deserves to be allowed and is accordingly allowed. The order dated 29th March, 1997 below exh. 26 passed by the Civil Judge (J.D.), Mahesana is hereby set aside. The trial court is directed to decide the application of the petitioner according to the procedure provided under Order 21, Rule 98 of Civil Procedure and decide the same as per procedure provided under Order 21, Rule 101 of Civil Procedure Code. Rule is made absolute accordingly with no order as to costs.

(Kundan Singh,J)

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